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CHARLES ELMORE

No. 333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

GENE McCANN, *Petitioner,*

vs.

TOM C. CLARK, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GENE McCANN,
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In the

Supreme Court of the United States

October Term, 1951

No.

Gene McCann, *Petitioner,*

v.

Tom C. Clark, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Gene McCann, the petitioner pro se in the above entitled cause, prays that a writ of certiorari issue to review the determination of the United States Court of Appeals for the District of Columbia Circuit, entered in said cause about June 21st, 1951, granting, without according leave to file a further amended complaint, the respondent's motion to dismiss the appeal from or affirm the order of the United States District Court for the District of Columbia which granted, without opinion, the respondent's motion to dismiss the amended complaint herein on the theory that it fails to state a cause of action upon which relief may be granted.

OPINION AND DETERMINATION BELOW.

The Per Curiam determination of the court below (R. 19-A) has not yet been reported.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on or about June 21st, 1951 (R. 19-A). The jurisdiction of this Court is invoked under Section 2106, Title 28, United States Code, and under such other statutes or rules as are applicable.

QUESTIONS PRESENTED.

1. Whether the District Court properly granted respondent's motion to dismiss and dismissed the entire amended complaint herein embodying six distinct causes of action to recover for personal injuries and damages inuring from unlawful acts perpetrated by him outside the scope of any official duty, authority, privilege or immunity he might claim.

2. Whether the duties and authority delegated and privilege and immunities accorded the Attorney General of the United States gave the respondent immunity from personal suit when he wilfully, knowingly, maliciously and deliberately went outside the scope of such duties and authority:

A. To kidnap and remove petitioner from the jurisdiction of the United States District Court for the Southern District of New York (in violation of Rule 8, formerly 31, of the United States Court of Appeals for the Second Circuit forbidding said removal) in order to prevent and thus preventing the perfection of his pending appeal from the order of that District Court dismissing (on proven forged documents and perjurious testimony) the writ of habeas corpus issued under mandate of this Court (320 U.S. 220);

B. To prepare and use a faked and forged photostat of the original of an alleged judgment-commitment to effectuate said unlawful removal, to give semblance of compliance with 18 U.S.C. 603 (now 4084), to unlawfully imprison petitioner in the Federal Insane Asylum

for three years and 144 days beyond the maximum sentence imposed under said original and to therein subject him to whippings (prohibited by 18 U.S.C. 545, now 3564), brutality and denials of the immunities against cruel and unusual punishment guaranteed by the Eighth Amendment to the Constitution of the United States;

C. To deny petitioner the right guaranteed by the First Amendment to said Constitution "to petition the Government for a redress of grievances";

D. To falsely and widely publish that petitioner is insane, unworthy of belief, that statements of fact made by him were untrue, and that averments with respect to and conclusions of law advanced by him were without merit or authority to support them;

E. To take away from petitioner the certified record in another habeas corpus proceeding affecting his substantial rights and liberty, furnished him by the United States Court of Appeals for the Second Circuit, in order to prevent its timely filing in this Court with a petition for a writ of certiorari and thus cause said petition to be refused because of laches in filing;

F. To take away from petitioner his typewriter, papers and other things necessary for him to prosecute in the courts of the United States sundry proceedings and pending appeals having to do with his substantial rights and liberty—all in contravention of the extant order of the trial court directing that he have possession and use of those things therefor and thus the law of the case under which he was imprisoned; and

G. To ignore, violate and spew upon the truth, Canons of Professional Ethics, Constitution and Laws of the United States while perpetrating these and the sundry other unlawful acts causing the deprivation of substantial rights and liberty and the personal injuries, torture and damages set forth in the complaint.

3. Whether there are to be one set of laws of the United States for the respondent and another for other citizens?

4. Whether a Circuit Court of Appeals may deny the right of appeal from a final judgment, accorded by 28 U.S.C. 1291, 1294, et seq., by entertaining and substituting therefor a "Motion to Dismiss or Affirm the Judgment" appealed from?

5. Whether a Circuit Court of Appeals is privileged to embody deliberate false statements in its Per Curiam determination to provide pretext for smearing an appellant and misrepresentations of the record and issues?

6. Whether a Circuit Court of Appeals may grant a motion to affirm a District Court order dismissing a complaint it asserts to be defective as to form without granting appellant leave to file an amended complaint conforming to what it considers artistic pleading?

STATEMENT.

The appeal to the court below was duly taken from the order of the United States District Court for the District of Columbia granting, without opinion or leave to file a further amended contract, the respondent's motion to dismiss the amended complaint herein on the theory that it fails to state a cause of action upon which relief may be granted.

The said complaint embodies six distinct causes of action to recover for personal injuries inuring from unlawful acts deliberately perpetrated by respondent outside the scope of any duty, authority, privilege or immunity he might claim.

Among other things, the complaint alleges that, with intent to injure petitioner and deprive him of sundry constitutional and other rights, with a reckless and negligent indifference to the consequences and his rights and safety,

without probable cause and over his objections, resistance and protestations, the respondent wilfully, knowingly, wrongfully and maliciously:

A. Kidnapped and removed petitioner from the jurisdiction of the United States District Court for the Southern District of New York (in violation of Rule 8, formerly 31, of the United States Court of Appeals for the Second Circuit forbidding said removal) in order to prevent and thus preventing the perfection of his pending appeal from the order of that District Court dismissing (on proven forged documents and perjurious testimony) the writ of habeas corpus issued under mandate of this Court (320 U.S. 220);

B. Prepared and used a faked and forged photostat of the original of an alleged judgment-commitment to effectuate said removal, give semblance of compliance with 18 U.S.C. 603 (now 4084), unlawfully imprisoned petitioner in the Federal Insane Asylum for three years and 144 days beyond the maximum sentence imposed under said original and therein subjected him to divers forms of torture, brutality, assaults, whippings (in violation of 18 U.S.C. 545, now 3564) and denials of the immunity against cruel and unusual punishment guaranteed by the Eighth Amendment to the Constitution of the United States;

C. Denied petitioner the right guaranteed by the First Amendment to said Constitution "to petition the Government for a redress of grievances";

D. Falsely and widely published that petitioner was insane, unworthy of belief, that statements of fact made by him were untrue, and that averments with respect to and conclusions of law advanced by him were without merit or authority to support them;

E. Took away from petitioner the certified record in another habeas corpus proceeding affecting his substantial

rights and liberty, furnished him by the United States Court of Appeals for the Second Circuit (decided Feb. 1, 1946, No. 187, October 29, 1945, Docket No. 20086), in order to prevent its timely filing in this Court with a petition for a writ of certiorari and thus caused said petition to be refused because of laches in filing;

F. Took away from petitioner his typewriter, papers and other things necessary for him to prosecute in the courts of the United States sundry proceedings and pending appeals having to do with his substantial rights and liberty—all in contravention of the extant order of the trial court directing that he have possession and use of those things therefor and thus the law of the case under which he was imprisoned; and

G. Ignored, violated and spewed upon the truth, Canons of Professional Ethics, Constitution and Laws of the United States while perpetrating these and the sundry other unlawful acts causing the deprivation of rights and liberty and the personal injuries, assaults, torture and damages set forth in the complaint.

The complaint further alleges:

H. That the aforesaid acts were directed, encouraged and ratified by respondent who personally cooperated therein and refused and failed to dissent or cause to be arrested the damages inuring therefrom;

I. That said acts were founded on considerations independent of public needs or ends and were effectuated to suppress evidence of the culpability of the respondent, to satisfy his personal and cowardly motives of spite, revenge, cruelty, greed and ambition and to inflict injury upon petitioner, damage to and deprivation of his substantial rights;

J. That the said acts were unlawful and known to the respondent to be unlawful and were neither the type nor

kind of acts committed by law to his control or supervision, were in excess of and not within the scope nor a part of any official duty, requirement, authority or jurisdiction that he might claim as having been delegated to him by the United States or defined by law, and the said acts were not within the ambit of the immunity accorded public officials for their acts nor within the class of acts which officials of the United States are empowered to perform with impunity or immunity; and

K. That as a result of such acts and of the malice, violence, oppression, wanton and willful conduct and evil behavior of the respondent, the petitioner was deprived of his right to prosecute proceedings and appeals and to hearings and arguments before, as well as to judicial determinations on the truth and Constitution and Laws by, the Courts of the United States, was deprived of his right under the order of the New York District Court and the law of the case to the possession and use of his typewriter, papers and other things necessary for the aforementioned proceedings and appeals, and petitioner was required to suffer great pain, mental anguish, laceration of feelings, shame, degradation, the loss of sundry rights, privileges and immunities secured by the Constitution and Laws of the United States, as well as deprivation of the right to seek and/or procure said rights, injury to fame and reputation, decrease in earning power, and the loss of profits from the interruption of and damage to his business, and petitioner was greatly harmed and damaged in his credit, reputation and standing among and was discredited, smeared and made infamous, odious and ridiculous before the President, Members of Congress, the Courts, Public and Press of the United States—all to his damage.

The prayer in each of the six causes of action seeks damages in the sum of $200,000.00—a total of One Million Two Hundred Thousand Dollars.

SUMMARY OF ARGUMENT.

The court below erred in affirming, without according leave to file a further amended complaint, the order of the district court that granted the respondent's motion to dismiss and dismissed each of the six causes of action set forth in the amended complaint.

REASONS FOR GRANTING THE WRIT.

On a motion to dismiss, the authorities conclusively hold that all inferences must be construed in favor of the pleading, that all facts therein alleged are deemed to be established, that if under any theory a cause of action is spelled out the motion must be denied, and that where, as here, the complaint sets forth multiple causes of action it cannot be properly dismissed in its entirety if any single cause is established, irrespective of deficiencies in any of the other causes. Furthermore:

> "It may not be improper to allege conclusions of law in order to show the relation of the various facts to one another and to the relief sought. Where law and facts are so combined as to render their separation impractical it is proper to allege conclusions of law." *Brogdex* v. *Food Machinery Corp.*, 29 Fed. Supp. 698, at 699.

It will be assumed this Court will take judicial notice that the respondent was Attorney General of the United States at the time of the acts complained of.

It also will be assumed this Court will take judicial notice that, on July 22nd, 1941, an alleged judgment-commitment was entered in the United States District Court for the Southern District of New York imposing on petitioner a sentence of six years imprisonment in the custody of the Attorney General, pursuant to 18 U.S.C. 753-f (now 4082); that petitioner was not finally released from impris-

onment thereunder until April 7th 1950 (three years and 144 days beyond the sentence imposed); that, excepting the period between April 9th 1942 anad March 3rd 1943 (when he was at liberty pending the Government's appeal from the determination of the United States Court of Appeals for the Second Circuit issuing and sustaining the writ of habeas corpus its March 4th 1942 decision invited him to procure in that Court, 126 F. 2d 774, reversed 317 U.S. 269), from July 22nd 1941 to March 27th 1946 petitioner was in the custody of and imprisoned by the Attorney General in the Federal Prison maintained under his control and supervision in New York City pursuant to 18 U.S.C. 753-e and 741 (now 4001); that pursuant to mandate of this Court (320 U.S. 220) an additional writ of habeas corpus to determine the legality of appellant's imprisonment was issued by the New York District Court on November 12th 1943 and, on January 26th 1944, it made an order dismissing said Writ (on proven forged documents and perjurious testimony) from which he duly appealed; that, pursuant to order of the Circuit Court, said appeal was to be heard only upon a record consisting of the original transcripts and exhibits filed in and impounded by the District Court; that without access to said transcripts and exhibits, which repeatedly was sought by and refused to petitioner, it was impossible for him to perfect said appeal until after his release from imprisonment on April 7th 1950; that immediately after said release he moved the Circuit Court for relief incident to its perfection, the Government made a cross-motion to dismiss it for lack of prosecution and, on June 27th 1950, the cross-motion was granted and the appeal dismissed; that said appeal was pending and undetermined from January 26th 1944 to June 27th 1950; that Rule 8, formerly 31, of the United States Court of Appeals for the Second Circuit provides:

> "(a) Pending an appeal from a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

> (b) Pending an appeal from a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the Writ or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case";

that respondent never obtained from any court or judge the order required by said Rule to change the custody of petitioner and remove him from the jurisdiction of the New York Circuit and District Courts while said appeal was pending; that, irrespective of 18 U.S.C. 753-f (now 4082) permitting the Attorney General to designate the place of confinement wherein the sentence was to be served, as long as that appeal was pending and no order had been made permitting such change and removal the said Rule (which has the force and effect of a statute under the authorities) estopped respondent from preventing its perfection through his kidnapping and removal of petitioner from that jurisdiction on March 27th 1946 and thus causing him to be kept therefrom and subject to the assaults and whippings (prohibited by 18 U.S.C. 545, now 3564), brutality and denials of substantial rights which continued from that date and beyond the maximum sentence until April 7th 1950—all under the faked and forged photostat of the original judgment-commitment prepared and used by respondent to give semblance of compliance with 18 U.S.C. 603 (now 4084); that under said original, under the Federal Rules of Criminal Procedure (which became effective and retroactive on March 21st 1946, see Post) and under the deductions earned and accorded by 18 U.S.C. 710 and 713 (now 4161 and 4163) the six-year sentence was served and respondent was required to release petitioner from imprisonment on November 14th 1946 and, on June 12th 1948, to discharge him from all obligations under the judgment. 18 U.S.C. 716-b (now 4164).

I.

The Acts Complained of Are Not Privileged When Perpetrated Outside the Scope of Any Official Duties or Authority Respondent Might Claim and the Issue of Fact as to Whether They Were So Perpetrated Must Be Tried.

As applicable to the Government and its officers, the maxim that "the King can do no wrong" has no place in our constitutional law. *Langford* v. *U. S.*, 101 U. S. 341.

The complaint is predicated on the fact that respondent acted beyond the scope of his duties and authority, hence is not immune from personal suit, and that petitioner is entitled to have tried and determined by a jury the issue of fact as to whether respondent acted beyond such scope in perpetrating the acts complained of, viz.:

> "The mere fact that the defendant Johnson was an Assistant United States Attorney, or the defendant Gorgon was an agent of the Federal Bureau of Investigation, would not per se establish the immunity of either of them from plaintiff's claim. Relief might be granted upon such claim notwithstanding the nature of the employment of either or both of such defendants unless, on the facts, they were acting lawfully in respect to the plaintiff in participating in or causing his arrest, continued imprisonment and prosecution. This could not be determined upon the pleadings.
>
> * * * * *
>
> From the fragmentary alleged facts appearing in the record and from the pleadings it appears that a clear issue of fact was raised between plaintiff and all defendants which plaintiff was entitled to have submitted to a jury."
>
> *Fine* v. *Paramount Pictures Corp.*, 171 F. 2d 571, at 574.

"* * * certainly, every act done by one, who is in fact an officer of the law, is not an official act or an act done under color or by virtue of his authority as such an officer. As stated by Mr. Justice Douglass in Screws v. United States (325 U. S. 91): 'Thus acts of officers in the ambit of their personal pursuits are plainly excluded.' And, where there is shown an act by one who is in fact an officer, it presented a factual question as to whether that act was a personal or official one."

Watkins v. *Oaklawn Jockey Club,* 86 F. Supp., 1006, at 1018.

"The rule is that an officer or agent of the United States may be sued where he has exceeded his authority or acted under an authority not validly conferred, and the exemption of the United States from liability for tort does not protect its officers or agents from liability to persons whose rights of property have been wrongfully invaded by them. Little v. Barrett, 2 Cranch, 170, 178, 2 L. Ed. 243; U. S. v. Lee, 106 U. S. 196, 220, 221, 1 S. Ct. 240, 27 L. Ed. 171; Noble v. Union River Logging Railroad Co., 147 U. S. 165, 171, 172, 13 S. Ct. 271, 37 L. Ed. 123; Belknap v. Schild, 161 U. S. 10, 18 S. Ct. 443, 40 L. Ed. 599; Tindal v. Wesley, 167 U. S. 204, 214, 215, 222, 223, 17 S. Ct. 770, 42 L. Ed. 137; Scranton v. Wheeler, 179 U. S. 141, 152, 21 S. Ct. 48, 45 L. Ed. 126; Philadelphia Co. v. Stimson, 223 U. S. 605, 609, 620, 32 S. Ct. 340, 56 L. Ed. 570; Golthra v. Weeks, 271 U. S. 536, 545, 46 S. Ct. 613, 70 L. Ed. 1074; Ickes v. Fox, 300 U. S. 82, 97, 57 S. Ct. 412, 81 L. Ed. 525."

W. A. Ross Construction Co. v. *Lardley,* 103 F. 2d 589, at 591.

To same effect:

Vietzke v. *Austin,* 54 F. Supp. 265, at 267-268, and cases there cited.

"The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded (Citing Cases). * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunctive process. * * * And it is equally applicable to a Federal Officer acting in excess of his authority or under an authority not validly conferred. (Citing Cases.)

'The complaint did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly, it is not a suit against the United States.' "

Goltra v. *Weeks,* 271 U. S. 536, at 545.

"The Missouri rule is in line with the general run of authority that a public officer charged with discretionary duties is not liable for a mistake of judgment or an erroneous performance of said duties unless he be guilty of wilful wrong in relation thereto. But that as to ministerial duties he is liable for the violation or neglect thereof to the party injured thereby and that a mistake of judgment does not excuse him. In Cook v. Hecht, 64 Mo. App. 273, speaking of the discretionary duties of public officers, the Court said: 'They are not liable so long as they honestly and in good faith perform the work intrusted to them.' "

Fidelity Casualty Co. of N. Y. v. *Brightman,* 53 F. 2d 161, at 165.

> "The defendant was acting unlawfully and outside of any authority conferred on him. A suit to enjoin the defendant from doing that which the law authorized him to do would be, in effect, a suit against the United States. A suit to enjoin him from doing a thing which was unlawful and unauthorized would not be a suit against the United States, but a suit against the defendant as an individual, and it would be unnecessary to join any other party."
>
> *Noce* v. *Edward E. Morgan Co.*, 106 F. 2d 746, at 749.

A ministerial officer is liable for exemplary damages for an injury done if the acts are clearly against the law, though he acted in good faith. *Tracy* v. *Swartwout,* 35 U. S. 80.

Executive federal officers are personally liable at law in the ordinary forms of action for illegal official acts or omissions to the injury of an individual. *U. S. ex rel Stokes* v. *Kendall* (C. C. D. C.) Fed. Case No. 15,517, 5 Cranch (C. C. 163), affd. 37 U.S. 524.

Where the act of a public officer or agent is unlawful, an action at law will lie against him personally for the wrong. It is a fundamental principle of constitutional law that every one that has suffered a legal wrong shall have legal redress. *Garber* v. *United States,* 46 Ct. Claims 503.

Where it can be made entirely plain to a court of equity that on facts about which there can be no dispute, or no reasonable doubt, the officers of the Government to whom the matter has been confided have, by mistake of law, deprived a man of his rights, equity will give relief. *Marquez* v. *Frisbie,* 101 U.S. 473.

In Re Sylvester (D. C. N. Y. 1930), 41 F. 2d, 231, the late Judge Woolsey, at p. 236, Col. 1, said:

"Furthermore, I remind Mr. Sylvester, and through him Mr. Lynch, that, as Judge Hough once pointed out, the United States Attorney and his aids are not privileged characters, but are subject to precisely the same rules and penalties, and to the same summary jurisdiction, as other members of the bar of this court. U. S. v. Marsea (D.C.), 266 Fed. 713, 717."

II.

The Complaint Charges That the Acts of the Respondent Were Prompted by His Cowardly Personal Motives of Spite, Revenge, Cruelty, Greed and Ambition, and Petitioner is Entitled to a Trial of the Issue as to Whether Such Acts Were So Prompted.

"While chief agent of the Government in so important a trust, when conducting with skill, fidelity and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends."

Wilkes v. *Dinsman,* 48 U.S. 89, at 123.

"The law does not contemplate the administration of official duty for the purpose of attainment of the officer's personal ends, or to satisfy his selfish personal motives of spite, illwill, revenge, greed or avarice. When an officer performs an act under color of his office with such motives as the actuating causes or clearly without any right to act, he is not acting within the scope of his authority and the cloak

of his office furnishes him no protection from civil actions for an injury perpetrated."

Gibson v. *Reynolds,* 172 F. 2d 95 (cer. den.), at 98-99.

"The fact that a party committing a flagrant wrong upon another subjected himself to criminal prosecution and punishment is no grounds for withholding exemplary damages in a civil action for the same act. (Citing cases.)"

Brown v. *Evans,* 17 Fed. 912, at 914, affd. 109 U.S. 180.

In vindictive actions, such as assault and battery, slander, libel, seduction, etc., where fraud, malice, cruelty, oppression, brutality or wantonness is shown on the part of the defendant, exemplary damages may be recovered. *Brown* v. *Evans* (supra).

A person receiving a wilfull injury from another is entitled to recover compensatory damages therefor irrespective of the motive of the wrongdoer, or his own calling or profession. *Boyle* v. *Case,* 12 Fed. 880.

Where a government officer injures a citizen by an official act, he is liable not only for actual damages, but for exemplary damages as well, if he proceeded in a malicious or wanton disregard of the citizen's rights. *Crawford* v. *Eldman,* 129 Fed. 992.

Negligence which shows a reckless indifference to consequences and the rights and safety of others is equivalent to wilfull wrong and justifies exemplary damages. *Whitmer* v. *Elpaso & S. W. Co.,* 201 Fed. 193.

In *Walsh* v. *Segal* (C.C.A. 2d), 70 F. 2d 698, at 699, Col. 1:

"It is generally recognized that in cases of personal torts, 'vindictive actions', such as assault and battery, slander, libel, seduction, criminal conver-

sation, malicious arrests, and prosecutions when the elements of fraud, malice, gross negligence, cruelty or oppression are involved, punitive or exemplary damages may be awarded. Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489, 23 L. Ed. 374; Brown v. Evans, 17 F. 912 (C.C. Nev.), 109 U.S. 180, 3 S. Ct. 83, 27 L. Ed. 898; Hudson v. L. & N. Ry. Co. (C.C.A.) 30 F. 2d 391; Dreimuller v. Rosgow, 93 N. J. Law, 1, 107 A. 144."

In *Meints* v. *Huntington, et al.* (C.C.A. 8th), 276 Fed. 245, at 248:

"and the taking of the plaintiff from the Son's home was ample proof to establish a conspiracy by them to do what was done, still the question as to whether there was a conspiracy becomes wholly immaterial; for as to each participant the law is unconcerned with the extent or the decree of his activity when it comes to consider the question of liability, and places all on the same footing, each equally liable jointly and severally, regardless of whether a conspiracy theretofore had been entered into. Cooley on Torts (2d Ed.), p. 145 and cases cited; Howland v. Corn, 232 Fed. 35, 146 C.C.A. 227; James v. Evans, 149 Fed. 136, 80 C.C.A. 240; Van Horn v. Van Horn, 52 N.J. Law, 284, 20 Atl. 485, 10 L.R.A. 184, 12 C.J. 585."

"Though a conspiracy is charged, yet if on the trial, the evidence connects but one person with the wrong actually committed, the plaintiff may recover as against him as if he had been sued alone."

Cooley on Torts (2d Ed.) at p. 145:

The essence of a tort is that it is an unlawful act done in violation of the legal rights of someone. *Langford* v. *U.S.*, 101 U.S. 341.

To give rise to liability in tort, there must be duty and violation thereof, and the violation must have proximately caused the injury. *Munger* v. *Equitable Life*, 2 Fed. Supp. 914.

III.

Public Officials Are Liable for the Tortious Acts of Their Subordinate Officials Where There Was Acquiescence Therein and Encouragement Thereof.

> "It is well settled law that public officers are not responsible for acts of subordinate officials, if such subordinates are themselves employees of the Government, where there is no negligence on the part of such public officials in employing them, unless the superior officer has disregarded or encouraged or ratified such acts, or has personally cooperated therein (Citing Cases)."
>
> *Fidelity & Casualty Co. of N. Y.* v. *Brightman*, 53 F. 2d 161, at 166.

> "Ratification may be proved, not only by an express assent, as in Gillett v. Whiting, 141 N.Y. 71, 35 N.E. 939, 38 A.M. St. Rep. 762, but also by implication from the principal's acquiescence or failure to dissent within a reasonable time after being informed by the agent of what has been done, as in Law v. Cross, 66 U.S. (1 Black), 533, 539, 17 L. Ed. 135."
>
> *Leviten* v. *Bickley* (C.C.A. 2d 1929), 35 F. 2d 825, at 827, Col. 1, per Circuit Judge Swan.

In prosecution against police officer for assault on the theory that two officers beat the prisoner with a hose while the other two looked on, instructions touching alleged agreement and connivance among defendants to commit as-

sault charged, and their duty to prevent assaults on prisoners from any source, including brother officers of peace, *held* proper under evidence. *Mostyn* v. *U.S.* (C.C.A.D. C. Feb. 27, 1933), 64 F. 2d 145.

> "It should be noted in the first place that the negligence complained of is that of the agent itself, for which an agent is liable on his own account. It is the same point considered in Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corp., 358 U.S. 349, 42 S. Ct. 386, 388, 66 L. Ed. 762, in which Mr. Justice Holmes said: 'An instrumentality of Government, he (it) might be, but the agent, because it is the agent, does not cease to be answerable for his acts. Osborn v. Bank of United States, 9 Wheat 738, 842, 843, 6 L. Ed. 204; U.S. v. Lee, 106 U.S. 196, 213, 221, 1 S. Ct., 240, 37 L. Ed. 171 * * * The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name.'"
>
> *Pennell* v. *Home Owners Loan Corp.*, 21 F. Supp. 497, at 497-498.

"The leading authority in point is Dowler v. Johnson, 225 N.Y. 39, 121 N.E. 487, 488, 3 A.L.R. 146, where the rule was approved that public officers are not liable for the negligence of their subordinates unless they cooperate in the act complained of or direct or encourage it. The New York Court of Appeals granted a new trial where the court below had dismissed a tort action against the Fire Commissioner of the City of New York, brought by a person

injured in a collision with an official automobile driven by a Fireman assigned to that duty by the Commissioner. The complaint had charged that, at the time of the collision, the automobile carrying the Commissioner was driven under his orders and that it was driven negligently. Holding that the Commissioner was not liable for the negligence of the Fireman on the theory of respondent superior, the Court stated the issue to be whether the defendant did in fact direct or encourage, or personally cooperate in the negligent act.

Asserting that the Commissioner's mere presence in the car would be sufficient of itself in all circumstances to charge him with liability, Judge Cardoza said: 'There must have been command or cooperation. De Carvalho v. Brunner, 223 N.Y. 284, 287, 119 N.E. 563; 1 Cooley on Torts (3rd Ed.), pp. 213, 244. But ratification may be equivalent to command, and cooperation may be inferred from acquiescence where there is power to restrain. * * * One cannot let oneself be driven at breakneck speed through city streets, and charge the whole guilt upon the driver, who has done one's tacit bidding.'

We approve Fowler v. Johnson, supra, as did the Eighth Circuit Court of Appeals in Fidelity Casualty Co. v. Brightman, 53 F. 2d 161, 166, where the doctrine was restated: 'It is well-settled law that public officers are not responsible for acts of subordinate officials, if such subordinates are themselves employees of the Government, where there is no negligence on the part of such public officials in employing them, unless the superior officer has directed or encouraged or ratified such acts or has personally cooperated therein.' "

Rich v. *Warren* (C.C.A. 6th, 1941), 123 F. 2d 198, at 199.

"A deputy is one who by appointment exercises an office in another's right, having no interest therein but doing all things in his principal's name and for whose misconduct the principal is answerable. (Citing cases.)"

Trammell v. *Fidelity & Casualty Co. of N. Y.*, 45 F. Supp. 366, at 371.

IV.

Under the Authorities, Rule 8 (Formerly 31) of the United States Court of Appeals for the Second Circuit Has the Force and Effect of a Statute and Estopped Respondent from Kidnapping and Removing Petitioner from New York While His Petition for a Writ of and Appeals from Orders Dismissing Theretofore Issued Writs of Habeas Corpus Were Pending and Undetermined, and the Preparation and Use of the Faked and Forged Photostat of the Original of the Alleged Judgment-Commitment to Effectuate Said Removal and His Imprisonment for Three Years and 144 Days Beyond the Six-Year Sentence, Resulting in the Unconstitutional and Unconscionable Brutality, Torture and Injuries to Which He Was Subject During That Over-Extended Period, Were Not Acts Within the Scope of Any Lawful Duties or Authority of the Respondent.

"* * * the rules promulgated by the Circuit Courts * * * have the force and effect of law."

American Gramaphone Co. v. *National Phonograph Co.* (*C.C.A.*, 2d), 127 Fed. 349.

"Where a statute imposes a duty upon a person for the protection or benefit of others, and he neg-

> lects to perform that duty, he is guilty of negligence, and is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute is designed to prevent and which were proximately caused by such negligence. (Citing cases.) * * * A regulation by a Department of Government, addressed to and reasonably adopted to the enforcement of an act of Congress, the administration of which is confined to such Department, has the force and effect of law if it be not in conflict with express statutory provisions. United States v. Grimmand, 220 U.S. 506; U.S. v. Birdsell, 233 U.S. 223, 231; U.S. v. Small, 236 U.S. 405, 409; U.S. v. Morehead, 243 U.S. 607; Maryland Casualty Co. v. U.S. 251 U.S. 342, 349."
>
> *W. A. Hover & Co.* v. *Denver & R. G. Ry.*, 17 F. 2d 881, at 883-884.

In *Remar* v. *Clayton Securities Corp.*, 81 F. Supp. 1014, it was held that a stockbroker arranging credit for plaintiff to purchase securities in excess of the amount of credit prescribed by regulations of the Securities & Exchange Commission was liable for the losses sustained as a result of the violation of such regulations and, at page 1017, Col. 1, the Court said:

> "The general principle regarding civil liability for violation of prohibitory statutes has been put with precision in Restatement, Torts, Sec. 286. Broadly stated, the rule is that where defendant's violation of a prohibitory statute has caused injury to plaintiff the latter has a right of action if one of the purposes of its enactment was to protect individual interests like the plaintiff's."
>
> "And it is no defense to the crime of kidnapping that an accused may have thought that he had a right to arrest and carry the person arrested out of the

country or that he did not intend to violate the law. The gist of the offense is the forceful carrying out of the state, and where this intention is shown to have existed, it is immaterial that the accused may have thought that he was acting within the law. Ignorantia Legis Neminem Excusat. (Citing cases.)"

Collier v. *Vaccaro,* 51 F. 2d 17, at 19-20.

To same effect:

U. S. v. *Parker,* 103 F. 2d 857, cer. den.;
Sanford v. *U. S.,* 169 F. 2d 71.

In *Weigel* v. *Brown* (C.C.A., 8th, 1912), 194 Fed. 652, where the prisoner was imprisoned seventy-eight days and the maximum legal sentence was only 36 days, the defendant was held liable in damages for the whipping and imprisonment of the plaintiff during the period beyond said maximum sentence and, at pages 656-657, the Court, per Sanborn, C.J., said:

"It is specified as error that the court refused to instruct the jury that if plaintiff knew, or could have known by the exercise of ordinary diligence, that the restraint recited in the commitment was for a longer period than authorized by law for a conviction for an assault and battery and failed to inform the defendant of that fact and to take legal steps for his release, and there was no neglect of the defendant in failing to ascertain the fact, the defendant might assume that the commitment was correct and the plaintiff could not recover, that the court also committed error in that it failed to instruct the jury that the plaintiff could have obtained his release by writ of habeas corpus, and that, if they found that he knew he was being detained longer than the statute authorized and failed to do this, or to notify the defendant of his unlawful detention,

this should be taken into consideration in determining the amount of the damages.

But there was no error in these rulings. The inalienable right to liberty and the pursuit of happiness demands itself that no one is estopped from recovering it or damages for its infringement by his silence in the face of lawless and resistless might. The legal presumption is that every infringement of that right is unlawful, and the burden is on him who inflicts it to justify his action. The Constitution perpetually cries out its stern and forbidding warnnig that 'no person shall be deprived of life, liberty, or property without due process of law.' And whoever, under such statutes as have been cited in this case, confines and inflicts corporal punishment upon a person, must see to it that he at least has process that is not void on its face to protect him in his course. Dynes v. Hoover, 20 How. 65, 80, 15 L. Ed. 838. After the time which the defendant could lawfully hold the plaintiff had expired, his agent, pursuant to general instructions, which the defendant had given him, whipped the plaintiff with a leather strap attached to a wooden handle while two other prisoners held him. What an absurdity it would be for a court to deliberately hold that Brown was estopped from recovering damages for his unlawful confinement and beating because this helpless victim did not cry out to his tormentor that his act was unlawful and did not thereby probably subject himself to a severer whipping and greater suffering."

"All those who instigate or participate in an unlawful restraint are liable as joint tort feasors (citing cases)." *Burlington Transport Co.* v. *Josephson* (C.C.A.S.D., 1946), 153 F. 2d, 372, at 375.

"the suit * * * implies at least, that the injuries resulted because of the failure of defendant to ex-

ercise care, as Superintendent, for plaintiff's well being. Plaintiff avers that after he had been struck and beat over the head with a blackjack by an officer, * * * he was dragged to a sub-basement solitary cell and chained by the wrists for eighteen hours; that, by order of defendant, he was placed and kept in the solitary cell for 92 days incommunicado; that, subsequently, by order of Irwin, he was fed bread and water six days a week * * * for 92 days; that with the knowledge of Irwin, he was starved, mistreated and inhumanly punished * * *. These averments, it seems to me, state a legitimate cause of action under the Civil Rights Act against Irwin.

* * * * *

"Discussing Sections 51-53 of Title 18, which must be construed in pari materia, with the Section in issue (Picking v. Pennsylvania Ry. Co., supra), the Supreme Court said recently in Screws v. United States, supra (325 U. S. 91), at 108: 'The problem is not whether state law has been violated but whether an inhabitant of a state has been deprived of a federal right by one who acts under color of law.' He who acts under 'color' of law may be a federal officer or a state officer. He may act under 'color' of federal law or of state law. The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when someone is deprived of a federal right by that action."

Gordon v. *Garson* (East. Dist. Ill., 1948), 77 F. Supp. 477, at 477-479.

In *Manning* v. *Ketcham* (C.C.A. Ky., 1932), 58 F. 2d 948 (action for false imprisonment against Judge), the Court said:

> "Honesty of purpose and sincere belief that appellant was acting in discharge of his official duties under his oath of office and for the public welfare is not available as a defense in action for false imprisonment other than in mitigation of damages (citing authorities)."

Every illegal confinement of a person is an imprisonment for which an action for false imprisonment will lie though a warrant may never have been issued. *Riegel* v. *Hygrade Steel Co.*, 47 Fed. Supp. 290, and at page 293, the Court there said:

> "If the imprisonment is under legal process but the action has been begun and carried on maliciously and without probable cause, the wrong is malicious prosecution."

If defendant or defendant's agent actually took part in arrest or imprisonment of the plaintiff or procured or instigated acts of officers of the law, defendant would be liable in action for false arrest and imprisonment. *Chesapeake & Potomac Tel. Co.* v. *Lewis* (App. D.C., 1938), 90 F. 2d 424; 69 App. D.C. 191.

An action for false imprisonment is one of trespass, and can be maintained only when the arrest is made without legal process, while the action for malicious prosecution is one of trespass on the case, and is maintainable when the process of the law has been perverted and improperly used without probable cause and for a malicious purpose. *Auerbach* v. *Freeman*, 43 App. D. C. 176. To same effect—*Carr* v. *National Discount Co.*, 172 F. 2d 899.

Where the court has no jurisdiction or disregards rules of procedure for its exercise, all parties to illegal trial and imprisonment are trespassers on party aggrieved thereby and he may recover in proper suit in civil courts. *Dynes* v. *Hoover*, 61 U.S. 65. To same effect *Director General Railroads* v. *Kastenbaum*, 263 U.S. 25.

As to the Forgery, There Are the Following:

Erasing words from instruments and severing portions thereof so that its effect is changed is material alteration and constitutes forgery at common law. *Keese* v. *Zerbst,* 88 F. 2d 795.

Forgery is the false making of a paper, but it need not be the entire fabrication thereof. Any addition to a genuine paper, or any alteration of it in an essential particular so as to give it a different meaning, is a forgery. *U. S.* v. *Osgood* (C.C.A.N.Y., 1819), Fed. Case 15,971-A, Betts, Ser. Bk. 27.

It is sufficient if there is intent to defraud someone by making or altering a writing which act might prejudice another. *Milton* v. *U. S.* (App. D. C., 1940), 110 F. 2d 556.

The act of making forged instruments is distinct from act altering instrument already made, although each constitutes forgery. *U. S.* v. *Peppa,* 13 Fed. Supp. 669.

Uttering and forging instrument are separate offenses. *Read* v. *U. S.,* 55 App. D.C. 43; 299 Fed. 918.

V.

Respondent Was Required to Release Petitioner from Imprisonment on November 14th, 1946.

The original of the alleged judgment-commitment, on its face, establishes that the term of imprisonment had expired and respondent was required to release petitioner therefrom on November 14th 1946.

On March 21st 1946 the Federal Rules of Criminal Procedure became effective and retroactive insofar as petitioner's then pending sentence was concerned. This has since been conceded by the Government.

Rule 59 of said Rules provides that: "They govern all criminal proceedings thereafter commenced and so far as practicable all proceedings then pending"; thus making them retroactive from March 21st 1946 with respect to the then pending sentence of petitioner since he never was asked by anyone to execute and never had executed the election, required by Rule 38 of said Rules, electing "not to commence service of the sentence" immediately upon or at any time after its imposition on July 22nd 1941, and was imprisoned by and confined in the federal prisons under the management and control of the Attorney General from that date until April 7th 1950 (excepting the hereinabove mentioned some eleven months period when he was at liberty under the writ of habeas corpus issued and sustained by the Circuit Court of Appeals in New York).

In addition, under 18 U.S.C. 3568 (effective since September 1st 1948 and retroactive to June 29th 1932 according to the Reviser's Notes upon and following same), petitioner's six-year sentence commenced to run from July 22nd 1941 when he was imprisoned by and received at the prison maintained under the control of the Attorney General in New York City and, under the deductions earned and accorded by 18 U.S.C. 710 (now 4161), the four years and 154 days of imprisonment thus required by the judgment was complete on November 14th 1946. For some time prior and ever since March 21st 1946 the respondent has been cognizant of the fact that any other interpretation or application of the Federal Rules of Criminal Procedure would render them void for repugnance to the "double jeopardy" and "cruel and unusual punishment" prohibitions of the respective Fifth and Eighth Amendments to the Constitution of the United States.

VI.

Respondent Exceeded His Duties and Authority in Denying Petitioner His Constitutional Right of Petition.

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law * * * abridging * * * the right of the people peaceably * * * to petition the Government for a redress of grievances."
>
> "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty * * * it does not deny his right to personal security against unlawful invasion." *Coffin* v. *Richard,* 143 F. 2d 443.

In *Thomas* v. *Collins,* 323 U.S. 516, at 530-531, the Court said:

> "It was not by accident or coincidence that the rights of freedom of speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for a redress of grievances. All these, though not identical, are inseparable. They are cognate rights, Cf. DeJonge v. Oregon, 299 U.S. 353, 364, and therefore are united in the First Article's assurance. Cf. Annals of Congress, 759-760.
>
> * * * * *
>
> This conjunction of liberties is not peculiar to religious activity and institutions alone, the First Amendment gives freedom of mind the same security as freedom of conscience (citing cases). * * * The grievances for redress of which the right of petition was insured, and with it the rights of assembly, are not solely religious or political ones.
>
> * * * * *
>
> The idea is not sound therefore that the First

Amendment safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case. * * *"

Also see:

U. S. v. *Korner,* 56 F. Supp. 242, at 246-248; and *National Labor Relations Board* v. *American Pearl Button Co.,* 149 F. 2d 311.

In addition:

"A communication concerning improper conduct of a federal judge to a member of the House of Representatives, which body may institute impeachment proceedings, doubtless also would be privileged."

Froelich v. *U. S.,* 33 F. 2d 660, at 664, Col. 1.

VII.

The Respondent Exceeded His Duties and Authority in Publishing Among Members of the Congress, Courts, Departments, Public and Press of the United States False and Libelous Charges and Information With Respect to Petitioner.

Every publication charging or imputing that which rendered a person liable to punishment or is calculated to make him infamous, odious or ridiculous is prima facie a libel and implies malice. *White* v. *Nichols,* 48 U.S. 266. To same effect—*Blunk* v. *Atchison Topeka & Santa Fe,* 38 Fed. 311.

AND BY HIS UNAUTHORIZED EX-PARTE IMPARTINGS OF FALSEHOODS WITH RESPECT TO

PETITIONER AMONG JUDGES AND JUSTICES OF THE COURTS AND MEMBERS OF THE CONGRESS OF THE UNITED STATES, THE RESPONDENT DEFRAUDED PETITIONER OF THE JUSTICE AND DETERMINATIONS TO WHICH HE WAS ENTITLED UNDER OUR CONSTITUTIONAL FORM OF GOVERNMENT.

> "A litigant is entitled to the honest, unbiased judgment of the judges of those courts before which his case comes. He is entitled to full hearing and to full argument in order that the merits of his side of the controversy may be established."
>
> *Deppe* v. *General Motors Corp.*, 131 F. 2d 379.

VIII.

The Authorities Upon Which Respondent Relied to Support His Motion to Dismiss the Complaint Have No Application to the Facts in the Case at Bar.

In the courts below the respondent argued that the complaint must be dismissed because of the language in the following cases: *Gregoire* v. *Biddle* (C.C.A. 2d, 949), 177 F. 2d 579; *Yaselli* v. *Goff*, 12 F. 2d 396; *Cooper* v. *O'Conner*, 69 App. D.C. 100, 99 F. 2d 135; *Standard Nut-Margarine Co.* v. *Mellon*, 63 App. D.C. 339; 72 F. 2d 557; *Jones* v. *Kennedy*, 122 F. 2d 40; 73 App. D.C. 292; and *Farr* v. *Valentine*, 38 App. D.C. 413.

In the *Gregoire* v. *Biddle* case, the plaintiff was arrested and imprisoned because of misinformation that he was a German Enemy Alien. After subsequently establishing that he was a Frenchman and obtaining his release, he sued the Attorney General, Immigration Inspector and others for false imprisonment. But the Court there merely held that there was no liability on the part of the defendants for such

an honest mistake in the course of their official duties and that it was privileged.

In the *Yaselli* v. *Goff* case, the Court merely held that an Assistant Attorney General of the United States was immune from civil action for having procured his own appointment as such to conduct malicious prosecution and that officers of the Department of Justice, *when engaged in prosecuting private persons,* enjoy the same privileges as judges. Nevertheless, even in that case, at page 405, the Court said:

> "But from this it does not follow that a District Attorney is not to be held accountable in a civil action for damages at the suit of an injured party for maliciously causing the arrest of such party for a pretended offense, which, at the time of the arrest, he knew had not been committed at all; for in such case the District Attorney is not acting in the line of his duty or within the scope of his authority."

Also, at page 406:

> "Neither do we doubt that, if a prosecuting attorney acts in like manner in a manner which is clearly outside the duties of his office, he too is liable."

In a decision later than the one cited by defendant in the *Cooper* v. *O'Connor* case, viz., 105 F. 2d 761; 70 App. D.C. 238, the Court, at 763, Col. 2, said:

> "There is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign. There is also a general rule that if any officer—ministerial or otherwise—acts outside the scope of his jurisdiction and without authorization of law, he is liable in an

> action for damages suffered by a citizen as a result thereof. See *Bradley* v. *Fischer,* 13 Wall 335, 351, 352, 20 L. Ed. 646. On the contrary, if the act complained of was done within the scope of the officer's duties as defined by the law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction of the law. 69 App. D.C. at pages 102-103; 99 F. 2d, at pages 137, 138, 118 A. L. R. 1440."

The *Standard Nut-Margarine Co.* v. *Mellon* case is distinguishable in that the Court there merely held that the defendants were not liable for damages because of their mistake in taxing plaintiff's product as oleomargarine since the taxing of products considered as such was within their jurisdiction and part of their official duties.

In the *Jones* v. *Kennedy* case, Mr. Justice Vinson, at page 42, said:

> "At the outset we call attention to the established law that public officers when acting within the scope of their official authority are immune from suits for damages."

and, at page 44, same case:

> "Plaintiff has not met, in these allegations, the task of showing acts which fall outside of the immunity."

In the *Farr* v. *Valentine* case, the Court, at page 421, said:

> "Here again the defendant was making an official communication in the course and discharge of his official duty. Had the defendant communicated

> these statements to one to whom he was under no obligation or duty to report, as the Commissioner of Pensions, a different case would be presented."

In short, the cases relied on by respondent to support his motion to dismiss hold that, on the face of the complaints before the courts in those actions, the acts complained of were performed in the ordinary course of the official duties of the defendants and, therefore, were privileged and the defendants immune from personal suit for the damages inuring therefrom.

But the acts alleged in the complaint at bar were not and could not be lawfully performed in the course of any obligation, lawful authority or jurisdiction that might be claimed by the respondent, he was under no duty to perform them, he was not engaged in any prosecution of the petitioner, and the acts did not involve any mistake of fact occurring in the exercise of judgment or discretion or an erroneous construction of the law on the part of any public officer. The said acts therefore clearly fall outside the ambit of any official immunity the respondent might claim.

Affirmance by this Court of the determination here appealed from therefore would constitute an endorsement of and accord further immunity for such acts and for the murders and other atrocities perpetrated by the Attorney General through the Ozark Mountain and other savages acting under his supervision and in his name at the Federal Insane Asylum near Springfield, Missouri.

IX.

The Court Below Was Without Authority to Entertain and Grant Respondent's Motion to Dismiss the Appeal or Affirm the Judgment of the District Court.

Under Sections 1291, 1294, 2071, 2072, et seq., of Title 28, United States Code, petitioner had an absolute right of appeal from the judgment of the district court and the court below had no authority to entertain and grant the respondent's motion to dismiss said appeal or affirm such a judgment. The said motion was entertained and granted by the court below on the specious theory that, irrespective of the fact that an appeal to this Court is not a right granted by statute, as long as this Court, under its Rule 7 (4), can lawfully entertain and grant such a motion the court below also can do so (and thus deny the right of appeal accorded by statute) simply by promulgating its Rule 6 which provides:

> "Except as otherwise provided in these rules, the practice in this court shall so far as practicable be the same as in the Supreme Court of the United States."

In addition, Section 2071 of Title 28, U.S.C., provides:

> "Each court established pursuant to Act of Congress may from time to time prescribe rules for the conduct of its business. Such rules shall be consistent with Acts of Congress * * *."

Furthermore, denial of the right of appeal is not within the scope of the *lawful business* of the court below.

X.

The Court Below Embodied in Its Per Curiam Determination False and Misleading Statements and Misrepresentations of the Record and Issues.

In order to provide pretext for smearing and discrediting the petitioner and to misrepresent the issues and record, in its Per Curiam determination, the court below falsely stated that he brought this action merely because of "indignities to which he was subjected while he was an inmate of a federal mental hosptal". Nothing could be further from the truth in view of the undenied and undeniable allegations of the proof of record pleaded in the amended complaint. Nor did the court below have justification for stating that the pleading "contains scurrilous matter" since that court refused to examine and never examined such proof.

XI.

The Court Below Was Required to Grant Petitioner Leave to File a Further Amended Complaint If Not Satisfied with His Form of Pleading.

It is well settled that a litigant will not be denied his day in court simply because a subservient district or circuit court may conveniently hold that his complaint does not conform to its artistic form of pleadng. It also is well settled that a circuit court of appeals may not properly affirm the order of a district court dismissing an inartistically drawn complaint without granting leave to file an amended pleading conforming to such artistic form. It therefore follows that if the court below was not satisfied with the form in which petitioner drew his pleading it

should have granted him leave to file a further amended complaint.

The concluding paragraph of petitioner's brief on appeal in the court below stated:

> "For all of the foregoing reasons the judgment of the court below dismissing the amended complaint herein must be reversed, and if this Court should conclude that there is a lack of proficiency in the pleading of any or all of the six causes of action embodied therein all causes should be remanded to that court with leave to file a new complaint in accordance with such suggestions as are made by this Court."

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted, and that there be reversed and held for naught the determination of the court below granting, without according petitioner leave to file an amended complaint, the respondent's motion to dismiss or affirm the order of the district court dismissing the complaint herein.

September, 1951.

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